United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4110

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN,

Petitioner,

v.

SECUPITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Orders of the
Securities and Exchange Commission

ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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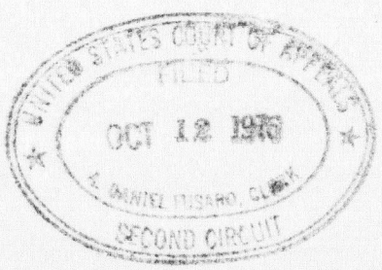

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Petitioner,

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ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether petitioner may obtain review in this Court of a series of orders summarily suspending trading in the securities of a company (a) when no such order is any longer in effect; and (b) when petitioner fails to show that he is aggrieved.

2. Whether the petitioner was given an adequate opportunity for a hearing under the circumstances of this case.

3. Whether (a) the creation of the Securities and Exchange Commission and the delegation to it of rulemaking and other powers, including the authority summarily to suspend trading in a security for

a limited period, are constitutional and (b) whether the Commission has abused its discretion in the exercise of its trading suspension power with respect to the orders sought to be reviewed in this proceeding.

COUNTERSTATEMENT OF THE CASE

This matter comes before this Court on a petition for review of certain orders of the Securities and Exchange Commission issued on and between March 3, 1976, and April 21, 1976, each of which suspended trading in the common stock of Canadian Javelin, Limited ("CJL"), for a period of ten days on the American Stock Exchange ("AMEX") and in the over-the-counter market. 1/ These orders were entered pursuant to the authority conferred upon the Commission by Section 12(k) of the Securities Exchange Act, 15 U.S.C. 78l(k), which was added by the Securities Acts Amendments of 1975, 89 Stat. 97, and which restates and consolidates the Commission's pre-existing summary trading

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1/ The suspension orders under review in this proceeding are dated March 3, 1976, March 12, 1976, March 23, 1976, April 2, 1976, April 12, 1976 and April 21, 1976. At the time Mr. Sloan filed his petition for review in this Court only the last of these orders was in effect, since the others by their terms had expired. Petitioner also purports to seek review of a number of earlier orders, which had also expired by their terms and which had been entered more than 60 days prior to the filing of his petition for review. This Court has no jurisdiction to review such orders because Section 25(a) of the Securities Exchange Act of 1934 limits the time for filing petitions for review to "60 days after the entry" of the order for which review is sought. 15 U.S.C. 78y(a).

suspension power. 2/ As the record reflects, each of the trading suspension orders under review, as well as each earlier trading suspension order, was issued upon an independent determination by the Commission that such suspensions were required in the public

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2/ The new Section 12(k) of the Act states:

"If in its opinion the public interest and the protection of investors so require the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

Previous Section 19(a)(4), 48 Stat. 896, provided:

"(a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors --

* * *

"(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

Previous Section 15(c)(5), 78 Stat. 574, provided:

"(5) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security (other than an exempted security) for a period not exceeding ten days. No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

interest and for the protection of investors. (A. 11, 13, 42, 73, 76, 79, 82, and 85-86) 3/

The series of trading suspensions of which the orders under review are a part commenced on April 29, 1975, after the Commission's staff had informed the Commission that the Royal Canadian Mounted Police were "conducting an extensive investigation into what they believe[d] to be a manipulation of Canadian Javelin's common stock on several Canadian stock exchanges as well as the American Stock Excnange." (A.12) The Commission then determined that a trading suspension was "required in the public interest and for the protecion of investors" (A.11) and aporoved a ten-day suspension of trading in CJL common stock "pending an announcement by Canadian Javelin concerning the investigation by Canadian authorities" (A.12) -- an announcement that was never made during the period that trading was suspended. In addition,

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3/ References to the Appendix hereinafter are cited as "A.___." Petitioner did not designate the portions of the record he intended to include in the appendix and thereby denied the Commission an opportunity to cross-designate portions of the record that it desired to have included. Instead, he unilaterally filed an appendix with this Court which omits all of the trading suspension orders contained in the record, except for the eight orders cited above.

Petitioner complains (Br. 3) that the Commission did not include in the record certain letters which had been received by the Commission concerning certain trading suspension orders entered during 1973 and 1974, prior to the orders complained of here, (see pp. 5-6, infra), as well as certain correspondence between Mr. Sloan and Commission personnel regarding the manner in which he should file his petition to the Commission for review of certain trading suspension orders applicable to CJL stock. While, in our judgment, these documents appear irrelevant to the matters before this Court, the Commission will certify copies of such documents to the Court should the Court indicate it believes they are relevant. Petitioner has included certain of these documents in the Appendix he filed with this Court (A 99-105).

the Commission, on the same day, commenced a private investigation "concerning allegations of manipulative activities by insiders of Canadian Javelin." (A.12) The investigation continued during the successive 10-day periods that trading was suspended and ultimately led to the filing of a civil injunctive action on April 26, 1976. Securities and Exchange Commission v. Doyle, et al., (S.D. N.Y.) Civ. Act. No. 76-1882.

The Commission's complaint in that action alleged that defendants, including John C. Doyle, who had been a founder and former president of CJL and was then a director of the corporation and certain other insiders of CJL had engaged in a scheme to manipulate the common stock of Canadian Javelin on the American Stock Exchange and two Canadian stock exchanges. The scheme is alleged to have involved a series of transactions wherein the defendants purchased and sold large quantities of Canadian Javelin stock in order to create an illusion of widespread and bona fide buying interest in Canadian Javelin. It was alleged that, in fact, these transactions were matched orders and wash sales involving no change in beneficial ownership and were designed to artificially increase and maintain the price of Canadian Javelin stock.

The last Commission order suspending trading in CJL stock terminated on May 2, 1976, and no additional trading suspension order respecting that stock has been issued since that date.

In a previous attempt to challenge the Commission's authority to issue summary trading suspension orders, petitioner had sought review

in this Court of certain Commission orders that had summarily suspended trading in the common stock of CJL between November 29, 1973, and November 14, 1974. 4/ This Court noted that the series of suspension orders which were the subject of that petition continued only until January 26, 1975, and that when it heard argument, a new series of suspension orders commencing on April 29, 1975 (which series subsequently included those involved in this case) was in effect. 5/ This Court held that all of the claims in petitioner's "blunderbuss attack" were "frivolous," except for his contention that the Commission's issuance of successive 10-day suspensions "for an indefinite period constitutes an abuse of . . . [the Commission's] authority and a deprivation of due process." 6/ This Court's opinion stated, however, that it could not decide the merits of that claim on the record that was before it because petitioner's pleadings covered "only the first

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4/ Sloan v. Securities and Exchange Commission, 527, F. 2d 11 (C.A. 2, 1975), certiorari denied, ___U.S.___ (June 14, 1976).

5/ Id. at 12

6/ Id. In this regard, this Court has upheld the power of Congress to grant summary trading suspension authority to the Commission. Sloan v. Securities and Exchange Commission et al., 535 F. 2d 676, 678 (C.A. 2, 1976) petition for certiorari filed September 10, 1976. There, in affirming the district court's dismissal of a complaint brought by Mr. Sloan, the Court declared that certain sections of the Securities Exchange Act, including the summary trading suspension power contained in Sections 15(c)(5) and 19(a)(4) of the Act prior to the Securities Acts Amendments of 1975, and certain Commission rules, were "valid and reasonable exercises of congressional power under the commerce clause and the SEC's delegated regulatory power which infringe no constitutional rights of plaintiff"(id.). The Court there also reiterated its view that petitioner's "blunderbuss attack" on the Commission's authority, which in that case challenged virtually "the entire structure of securities regulation in the United States" was "frivolous" (id.).

series of suspensions, which have now terminated" and because the record was "unclear" with respect to the reasons for the second series of suspensions. Sloan v. Securities and Exchange Commission, supra, 527 F. 2d at 12. After noting that petitioner might wish to challenge the second series of suspensions as well as the first, and that the Commission was "willing . . . to grant [petitioner] some sort of administrative hearing, thus satisfying any possible exhaustion [of remedies] requirement while also contributing to the record," this Court dismissed the petition for review "without prejudice to [petitioner's] repleading after an administrative hearing . . . from which judicial review may be sought" (id; footnote omitted).

On or about March 15, 1976, prior to termination of the second series of trading suspensions, petitioner filed a petition (A. 89) with the Commission seeking review of all of the suspensions of trading in CJL securities from November 29, 1973, up to and including the date that his petition might be decided. He requested a hearing and asked, among other things, that the Commission declare all of the previous trading suspensions illegal (A. 89). On April 21, 1976, after considering the matters contained in Mr. Sloan's petition, an affidavit submitted in support thereof (A. 90-95), and the reasons for which the trading suspension orders had been issued, the Commission decided that the public interest and the protection of investors required it to suspend trading in CJL common stock for an additional

10 days (A. 85-86). Accordingly, trading was suspended from April 23, 1976, until May 2, 1976, when the second series of suspensions terminated.

The Commission's Notice of Suspension of Trading (A. 85-86), reflecting its disposition of the petition was published in the Federal Register at 41 Fed. Reg. 17983-17984. 7/ It explains that the first series of suspensions had been based on the Commission's institution of a civil injunctive action, on November 29, 1973, alleging that CJL and certain of its principals had violated the federal securities laws in connection with the company's filing of false reports with the Commission and CJL's dissemination of "a series of press releases containing false and misleading information relating to its purported development of Panamanian mineral properties." With respect to the second series of suspensions then in effect, the Commission stated that it had suspended trading "as a result of a lack of information concerning pending investigative action by Canadian regulatory authorities." In addition; the Notice reflected that: (a) criminal informations returned in Canada indicated that CJL common stock "may have been artificially manipulated on two Canadian stock exchanges . . .; (b) the Commission was "actively investigating, among other things, possible manipulation of the stock in the United States securities markets"; (c) private civil suits were pending in Canada concerning control of CJL and

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7/ Petitioner describes the Commission's Notice of Suspension as a "letter" and claims (Br. 7) that "the contents of this letter were not published or otherwise released to the general public . . . ." This claim is patently without merit. In fact, the Federal Register citation of the Commission's Notice is contained in the Commission's brief in opposition to a petition for a writ of certiorari in an earlier case, which Mr. Sloan elected to include in the Appendix herein (A. 113, n. 3).

a Canadian provincial court had recently installed a new board of directors for the company; and (d) CJL had been delinquent since March 31, 1976, "with respect to the filing of its 10-K report." 8/

On April 22, 1976, the Commission announced the adoption of informal procedures "by which any person adversely affected by a summary suspension pursuant to Section 12(k) of the Securities Exchange Act may obtain prompt consideration by the Commission of the reasons such person believes the continued suspension is not in the public interest or is not required for the protection of investors." (A. 121-122; Securities Exchange Act Release No. 12361; 41 Fed. Reg. 18290). These procedures provide such a person with an opportunity for a hearing should "a genuine issue as to any material fact" be presented to the Commission for determination (A. 122). Although the Commission announced the adoption of these procedures one day after announcing the disposition it had made of Mr. Sloan's petition, the criteria set forth in the Commission's release concerning the informal procedures were substantially followed in considering his objections to the trading suspensions affecting CJL stock.

On September 15, 1976, the Commission moved to dismiss this appeal on the ground that the case has become moot. This motion has been scheduled for oral argument on October 13, 1976, the same day that oral argument has been scheduled on the merits of Mr. Sloan's petition for review.

8/ A 10-K report is an annual report of corporate activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commission's statutory authority summarily to suspend trading in securities for periods of ten days is indispensable to the maintenance of orderly capital markets. The grant of that authority with respect to securities traded on the national securities exchanges was deemed necessary by Congress when the Securities Exchange Act was initially enacted (Section 19(a)(4)); the legislative judgment on that delegation of authority was reconfirmed and the Commission's exercise of that delegated authority approved in 1964, when the summary trading suspension power was enlarged to reach over-the-counter securities (Section 15(c)(5)). Moreover, in amendments to the Securities Exchange Act that became effective in June 1975, the Commission's substantive powers under these sections have been consolidated in the new Section 12(k) of the Act. 9/

When it determined to repose additional trading-suspension authority in the Commission by its 1964 amendment, Congress re-stated the role of that authority in the Commission's regulatory scheme:

> "[T]he Commission could invoke this suspension power in those cases in which fraudulent or manipulative practices of the issuer or other persons have deprived the security of a fair and orderly market, or where some corporate event makes informed trading impossible and provides opportunities for the deception of investors." 10/

9/ S. Rep. No, 94-75, 94th Cong., 1st Sess. (1975), p. 106. The Senate Report there stated that the proposed Section 12(k) "would consolidate in one place the power the SEC presently has to . . ." issue summary trading suspension orders. (emphasis added).

10/ S. Rep. No. 379, 88th Cong., 1st Sess. (1963), p. 66

The series of trading suspensions sought to be reviewed here were undertaken by the Commission in response to precisely those circumstances foreseen by Congress--apparent "fraudulent or manipulative practices of" CJL insiders which "deprived the security of a fair and orderly market."

While the summary trading suspensions authorized, first by Sections 19(a)(4) and 15(c)(5) of the Securities Exchange Act, and now by Section 12(k) of the Act, are of short duration, they may be entered repeatedly where, as here, the Commission makes an independent determination that continued suspension is required in the public interest and for the protection of investors at the end of each ten-day suspension period. Although the statutes involved do not expressly authorize the Commission to repeat the ten-day trading suspensions, Congressional approval of such repetitions was made clear in the legislative history of former Section 15(c)(5) of the act, 78 Stat. 574, when Congress extended to over-the-counter securities the Commission's summary suspension power theretofore limited to securities on registered national exchanges. In its report, the Senate Committee on Banking and Currency stated:

> "The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the ten-day period, it determines that another suspension is necessary. The committee accepts this interpretation. At the same time the committee recognizes that suspension of trading in a security is a drastic step and that prolonged suspension of trading may impose considerable hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint

and will proceed with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible." (emphasis added) 11/

Congress made no express provision for review of orders suspending trading. In view of the short duration of each suspension

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11/ Id. at 66.

As we have noted, the 1975 Amendments to the Securities Exchange Act restated and consolidated the Commission's authority summarily to suspend trading in Section 12(k). Congress was aware in 1964, and again in 1975, that the Commission made it a practice to roll over ten-day trading suspensions upon making a determination that a further suspension was required in the public interest and for the protection of investors. It was felt, however, that additional authority was appropriate in cases of extended duration. Accordingly, a new subsection (j) was enacted. The Commission had supported this amendment. See Hearings before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs on the Securities Acts Amendments of 1975, 94th Cong., 1st Sess., (1975), p. 213. The new Section 12(j) gave the Commission power to suspend or revoke the registration of a security for a period of up to 12 months, if, after notice and opportunity for hearing, the Commission should find that the issuer of such a security had failed to comply with any provision of the Act or rules thereunder.

The legislative history points out that the Commission was expected to use this latter section "rather than its ten-day suspension power in cases of extended duration." S. Rep. No. 94-75, supra, n. 9 at 106 (emphasis added). A period substantially longer than the initial ten-day suspension, however, was necessarily meant by "extended duration," since it would be difficult, if not impossible for the Commission to make a finding of violation by the issuer, after a hearing for which opportunity had been provided, within ten days of an initial suspension. Moreover, there is no suggestion in the legislative history that the Commission should not be able to continue a suspension ordered pursuant to Section 12(k) when it appears that the marketplace might be relying on inadequate information or on manipulated prices and when it does not appear that there is a violation by the issuer. Had Congress intended to eliminate any roll-over power of the Commission as to ten-day suspensions, it presumably would have put such a limitation in the statute itself or at least stated its intent in unambiguous terms in the 1975 legislative history.

order, court review of these orders was probably never contemplated by Congress. This is not to say that in an appropriate case judicial review could not be had. But whether such a suspension order should be reviewed in a district court, pursuant to the review provisions of the Administrative Procedure Act, or in a court of appeals, pursuant to the specific provisions of Section 25 of the Securities Exchange Act, is not clear. That question, however, need not be resolved here, because to obtain any kind of judicial review of administrative agency action, there must be a case or controversy. Here not only have the orders appealed from expired, but there is no Commission order in effect, nor has there been since May 2, 1976, suspending the trading in CJL stock. Moreover, petitioner has not satisfied the statutory requirement of standing to seek review in this Court, having failed to show that he is "aggrieved" by the Commission actions for which he seeks review.

ARGUMENT

1. THIS PETITION FOR REVIEW IS NOT PROPERLY BEFORE THIS COURT.

A. The Issues Presented by the Petition for Review are Moot. 12/

The series of trading suspensions sought to be reviewed here terminated on May 2, 1976, and, accordingly, there is no Commission order in effect which prevents petitioner from purchasing or selling

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12/ The Commission's argument on this point is substantially the same as the argument contained in its Motion to dismiss the appeal on the ground of mootness, which was filed with this Court on September 15, 1976.

shares of CJL stock. 13/ In addition, the series of trading suspension orders for which review is sought cannot be regarded in any sense as a reoccurrence of the Commission's previous suspensions of trading with respect to CJL stock, since they were entered in a wholly different factual context and for reasons totally independent of those which led the Commission to order the previous suspensions. 14/

Courts do not sit "to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . ." Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 284 (1969); See also Socialist

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13/ The trading of CJL stock has been suspended by the AMEX, however, since April 30, 1975.

14/ Petitioner contends (Br. 49) that "although the S.E.C.'s suspension of trading in Canadian Javelin Ltd. has technically terminated, the S.E.C. still has been able to prevent any resumption of trading because of the operation of S.E.C. Rule 15c2-11, 17 C.F.R. Section 240.15c2-11." This rule defines as a "fraudulent, manipulative and deceptive practice" the publication by a broker-dealer of quotations for securities as to which current data is not available. It is not directly challenged by this appeal and, in any event, is clearly within the scope of Section 15(c)(1) of the Securities Exchange Act, which authorizes the Commission to define "fraudulent, deceptive or manipulative" acts and practices of securities brokers and dealers and quotations by them that are "fictitious."

Labor Party v. Gilligan, 406 U.S. 583 (1972). In addition, constitutional questions "must be presented in the context of a specific live grievance." Golden v. Zwickler, 394 U.S. 103, 110 (1969).

It is true that an exception to the "mootness" principle has been recognized in controversies where the action complained of is "capable of repetition, yet evading review . . . ." Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). If petitioner were seeking review of an active series of trading suspensions and his efforts were frustrated by the ten-day duration of the Commission's orders, that exception might well have force here. But the series of trading suspensions entered in conjunction with the Commission's enforcement action against CJL ended five months ago, and, since no suspension is now in effect or planned, any complaint which petitioner wishes to air with respect to the propriety of past suspensions is purely hypothetical. The Supreme Court has held that a case is moot where the possible recurrence of allegedly illegal conduct is speculative and the recurrence of the controversy "purely a matter of conjecture." Securities and Exchange Commission v. Medical Committee for Human Rights, 404 U.S. 403, 406 (1972).

Petitioner's brief cites United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953), for the proposition that a voluntary cessation of allegedly illegal conduct does not make a controversy moot. That case was limited, however, by Medical Committee to apply only in cases where the allegedly illegal conduct is likely to be repeated. 404 U.S. at

406. At this point, whether there might be a future suspension of trading in CJL stock is bare speculation.

Citing Roe v. Wade, 410 U.S. 113 (1973) and Sosna v. Iowa 419 U.S. 393 (1975), petitioner claims this case is one of those not moot because they would otherwise be "capable of repetition yet evading review." Petitioner ignores the fact that Sosna and Roe were class actions. The class nature of the suit was a major factor in the Court's decision in Sosna (419 U.S. at 401):

> "Although the controversy is no longer live as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent."

The normal rule concerning mootness was not changed (id. at 402):

> "Our conclusion that this case is not moot in no way detracts from the firmly established requirement that the judicial power of Art. III Courts extends only to 'cases and controversies' specified in that article . . . there must be a live controversy at the time this Court reviews the case."

Roe, involving abortion laws, was found not moot because the court took judicial notice that "[p]regnancy often comes more than once to the same woman . . . . " 410 U.S. at 125. (emphasis added).

Finally, petitioner refers to Sibron v. New York, 392 U.S. 40 (1968) and United States v. Schrimsher 493 F.2d 842 (C.A.5, 1974). These cases are both criminal cases, where the usual rules concerning mootness do not apply. As the Court stated in Sibron:

> "[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57.

The Court in Sibron, 392 U.S. at 53-58, gave examples of the collateral consequences of criminal convictions that change the usual rules concerning mootness; the possibility of deportation for aliens, higher sentences for future crimes based on the past convictions or recidivism statutes, character impeachment if the person puts his character in issue in a future trial, and impairment of civil rights. These considerations do not apply in this case.

B. Petitioner Lacks Standing To Seek Judicial Review of the Commission's Orders in Question

Petitioner has failed to demonstrate that he has standing to seek review of the Commission's orders in this Court. Absent a showing that petitioner has satisfied the requisites as to standing contained in the judicial review provision of the Securities Exchange Act (Section 25), 15 U.S.C. 78y, this Court is without jurisdiction. Pursuant to that provision, standing to seek review in the court of appeals of Commission orders entered under the Securities Exchange Act is limited to "a person aggrieved by a final order of the Commission . . . ." The petitioner has not explained in his brief to this Court how he is aggrieved by the orders sought to be reviewed; indeed, he has shown no cognizable interest in the subject matter of the orders. In the affidavit submitted in support of his petition for review by the Commission of various trading suspension orders, Mr. Sloan alleged that he was the "owner" of thirteen shares of CJL stock and that, in the past, he had "engaged in substantial purchases and short sales of shares of Canadian Javelin Ltd.

particularly during 1973 prior to the November 29, 1973 suspension of trading (A. 91). 15/ In addition, Mr. Sloan's affidavit asserts that "I would like to make a substantial investment in Canadian Javelin Ltd. at current prices but am prohibited from doing so because of the suspension of trading" (A.93). He also points out, somewhat inconsistently, that "[e]xcept for a brief period in late 1973, Canadian Javelin Ltd. has traded on a continuous basis on the Montreal Stock Exchange." (A.92).

In Independent Investor Protective League v. Securities and Exchange Commission, 495 F. 2d 311, 312 (C.A. 2, 1974), this Court dismissed petitions for review of orders entered by the Commission

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15/ In his affidavit Mr. Sloan states that, based on these circumstances, "the Court of Appeals has already decided that . . . I am an aggrieved person and have standing to review the suspension orders in question." (A. 91). But this Court's decision as to standing was made in the context of the earlier series of trading suspensions, which had, among other things, hindered Mr. Sloan's ability to meet his obligations as a short seller:

> "Sloan engaged in extensive transactions with CJL stock, including short selling, which were frustrated by the suspension orders." Sloan v. Securities and Exchange Commission, supra., n. 4, 527 F. 2d at 12. (emphasis added).

Mr. Sloan does not even contend that such a circumstance is present with respect to the trading suspension orders under review here.

In March, 1976, at the time Mr. Sloan sought Commission review of various trading suspension orders, he indicated that CJL stock was trading on the Montreal Stock Exchange at prices "between $1.50 and $2.00 per share"(A. 92). Accordingly, even if he has retained ownership of the 13 shares of CJL stock he owned in March of 1976, a fact which is not apparent from his brief, his "stake" in obtaining review of even a current suspension would not appear to be substantial.

pursuant to the Investment Company Act of 1940, 15 U.S.C. 80a, et seq., holding that petitioners lacked standing, pursuant to Section 43, 15 U.S.C. 80a-42, the comparable review provision of that Act, because the petitioners had failed to allege that they "[had] suffered, or will suffer, actual injury or discrimination." In the light of the fact that CJL stock has traded "on a continuous basis on the Montreal Stock Exchange" during the period that the trading suspension orders under review were in effect and the fact that there has been no Commission order preventing the trading of CJL stock in the United States for the past 5 months, it is clear that Mr. Sloan has neither suffered, nor is in imminent danger of suffering, "actual injury" as a result of the orders for which review is sought.

A useful analogy is found in Sierra Club v. Morton, 405 U.S. 727 (1972), in which the Court construed the broad review provision of the Administrative Procedure Act. While acknowledging that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . ," id. at 734, the Supreme Court determined that a mere general interest in those things was insufficient to confer standing upon the Sierra Club. The appropriate test of "injury in fact" applied by the Court would require "more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." id. at 734-735.

This element of "injury in fact" was reaffirmed and underscored in the subsequent decision in United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-689 (1973), where it

was stated that the person seeking review

> "must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." (Emphasis added).

while the standard was met in that case, petitioner has not met it in the instant case.

Petitioner also purports to be representing other shareholders of CJL (Br. 43-44) and asserts (Br. 43) that he:

> "has standing to assert not only his own constitutional right to trade in shares of Canadian Javelin Ltd. but Canadian Javelin Ltd.'s constitutional right to have its shares freely traded.

But this suit is not brought derivatively on behalf of CJL or as a class action on behalf of its shareholders.

Petitioner relies, however, on Singleton v. Wulff, __U.S.__, 44 L.W. 5213 (1976). That case involved an action brought by two physicians challenging the constitutionality of a Missouri statute that excluded abortions not "medically indicated" from the Medicaid benefits which would otherwise have been available to needy persons. The Supreme Court there recognized the rule, __U.S.__, 44 L.W. 5215-5216, that "'[o]rdinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party,'" but held that, under the circumstances of that case -- including, inter alia, the facts that a woman cannot safely secure an abortion without a physician's aid, that a needy woman could not easily secure an abortion from a physician without access to Medicaid benefits and that considerations of privacy might make a woman reluctant to bring such suit in her own right — the justification for the usual rule was not present.

these circumstances clearly are not present in the instant case. In addition, the Court expressly recognized, __U.S.__, 44 L.W. 5215, that:

> "Federal courts must hesitate before resolving a controversy . . . on the basis of the right of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not . . . . Second, third parties themselves usually will be the best proponents of their own rights."

II. PETITIONER WAS GIVEN AN ADEQUATE OPPORTUNITY FOR HEARING IN LIGHT OF THE CIRCUMSTANCES.

Petitioner complains (Br. 24) that he "was not given the opportunity for a hearing or to present evidence. Moreover, no evidence was offered in support of the S.E.C.'s claims and the facts alleged in Sloan's affidavit were dismissed as 'speculation.'" He concedes, however (Br. 40), that a suspension of trading in a security is in the nature of legislative action. Quasi-legislative action by the Commission does not require that the Commission support its action by testimony or documentary evidence or that its staff meet a burden of proof comparable to that which might be required in the Commission's quasi-adjudicative activities. 16/ The mere fact that the Commission learns of a rumor affecting the market for a stock may be sufficient for a trading suspension until investors have

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16/ Compare 5 U.S.C. 553, the Administrative Procedure Act's provisions dealing with general rulemaking, with 5 U.S.C. 554, the Administrative Procedure Act's provisions dealing with adjudication. This is not to concede that for a summary procedure such as a trading suspension even the requirements of general rulemaking are necessary.

an opportunity to learn the facts. 17/ Moreover, there are often sound reasons why the existence of an investigation by the Commission should not be publicized, both for the success of the investigation and to preclude injury to individuals who may subsequently appear guiltless.

Under these circumstances, petitioner's quotations (Br. 10) from United States v. Nugent, 346 U.S. 1 (1953), and Green v. McElroy, 360 U.S. 474 (1959), are wholly inapplicable. The rights of confrontation and cross-examination discussed in those cases do not relate in any way to the kind of emergency action Congress believed was required when it authorized the Commission summarily to suspend the trading of a security. We concede that when there is an emergency requiring immediate governmental action, anyone who can show injury therefrom should be given an opportunity to be heard as soon as practicable to show why he is hurt and otherwise to express his views, but we submit that no formal procedure is required where the action is of a quasi-legislative nature.

In this respect, the Commission's release (A. 121-122) following this Court's decision in Sloan v. Securities and Exchange Commission, supra., n. 4, 527 F. 2d 11, announced the adoption of informal procedures

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17/ Petitioner argues (Br. 24) "that there exists no legal obligation for any person to 'cooperate' with the S.E.C." We do not suggest that there is such an obligation. A lack of cooperation by management with the Commission's efforts to determine the facts relating to activities in its company's stock, however, might require the Commission, in order to protect investors, to continue a suspension for a longer period than otherwise might be necessary.

for Commission review of summary suspensions that are adequate (1) to permit the Commission to assess the harm resulting from its action to any person claiming to be hurt thereby and (2) to provide an opportunity for the kind of administrative hearing that permits a reviewing court to have sufficient facts upon which to determine whether the agency has abused its broad discretion. That release describes the new procedures as a means "by which any person adversely affected by a summary suspension pursuant to Section 12(k) of the Securities Exchange Act may obtain prompt consideration of the reasons such person believes the continued suspension is not in the public interest or is not required for the protection of investors" (A. 121-122). In this regard, the release states that such persons "may petition the Commission that it not renew the suspension" and that "[s]uch petition . . . should set forth with particularity the facts upon which petitioner relies and should be sworn to by the petitioner or an authorized officer of the petitioner" (A. 122). In addition, it states (A. 122):

> "If the petitioner so requests in the petition, and if upon examination of the petition the Commission is of the opinion that there is a genuine issue as to any material fact, the Commission will provide an opportunity for prompt presentation of all material facts. If no such opportunity is requested in the petition or <u>if in the opinion of the Commission there is no genuine issue as to any material fact, the Commission will determine the issue upon the basis of the information contained in the petition and any other relevant facts known to the Commission</u>. (A. 122) (emphasis added).

Although the Commission publicly announced the adoption of these informal procedures the day after it announced its disposition of Mr. Sloan's petition to the Commission for review of certain trading suspension orders, the criteria set forth in the Commission's release were substantially followed in considering Mr. Sloan's petition. The affidavit submitted in support of the petition alleged in substance that:

(a) successive ten day "suspensions of trading are illegal regardless of what reason the S.E.C. may give to justify the suspensions," (A.91);

(b) the "most recent" annual report issued by CJL contained "an earnings statement and a balance sheet both of which are certified by the accounting firm of Lee & Martin." (A. 92)

(c) officers of CJL, who owned CJL stock, desired a "continued suspension" of trading because the market price of their stock "would almost certainly go down" if the series of trading suspensions then in effect should be terminated. (A. 93).

(d) the trading suspensions were "aiding Mr. Doyle to the detriment of all United States stockholders . . . " of CJL (A. 94); and

(e) "in all probability Mr. Doyle is bribing a person or persons at the S.E.C. in order to bring about repeated suspensions of Canadian Javelin Ltd." (A. 95)

Mr. Sloan added that, if he were granted a hearing, he intended "to develop facts . . . in an attempt to prove . . ." the last allegation. (A. 95) The Commission determined that the facts alleged by Mr. Sloan in support of the assertion that Mr. Doyle was bribing persons associated with the Commission "in no way support . . . [his] speculation" and also determined that a further suspension of trading was required in "the public interest" and for "the protection of investors," pointing out the reasons why in some detail. (A. 86; See pp. 8-9, supra).

It is apparent from the Commission's disposition of Mr. Sloan's petition (A. 85-86), and the nature of the allegations asserted in the affidavit submitted in support of the petition (A. 90-95), that the Commission was of the opinion that the petition did not present a "genuine issue as to any material fact" that was pertinent to the trading suspensions. Accordingly, the Commission properly determined that it was not necessary to have a hearing prior to making a determination with respect to Mr. Sloan's petition for review.

III. THE CREATION OF THE SECURITIES AND EXCHANGE COMMISSION AND THE DELEGATION TO IT OF RULEMAKING AND OTHER POWERS INCLUDING THE AUTHORITY TO SUSPEND TRADING IN THE SECURITIES MARKETS ARE A VALID EXERCISE OF THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE.

On at least eleven occasions of which we are aware this Court has considered various challenges to the constitutionality of the Securities Exchange Act and rules promulgated thereunder. In each case the constitutionality of the challenged provisions has been sustained. 18/

18/ Sloan v. Securities and Exchange Commission, et al., 535 F. 2d 676 (C.A. 2, 1976), rehearing denied, April 16, 1976, petition for writ of certiorari filed September 10, 1976; Sloan v. Securities and Exchange Commission, 527 F. 2d 11 (C.A. 2, 1975), certiorari denied, ___ U.S. ___ (No. 75-1507); United States v. Persky, CCH Fed. Sec. L. Rep. ¶95,209, C.A. 2, June 18, 1975; United States v. Guterma, 281 F. 2d 742 (C.A. 2), certiorari denied, 364 U.S. 871 (1960); Securities and Exchange Commission, v. May, 229 F. 2d 123 (C.A. 2, 1956); Gratz v. Claughton, 187 F. 2d 46 (C.A. 2), certiorari denied, 341 U.S. 920 (1951); Park & Tilford, Inc. v. Schulte, 160 F. 2d 984 (C.A. 2), certiorari denied, 332 U.S. 761 (1947); United States v. Minuse, 142 F. 2d 388 (C.A. 2), certiorari denied, 323 U.S. 716 (1944); Charles Hughes & Co., Inc. v. Securities and Exchange Commission, 139 F. 2d 434 (C.A. 2, 1943), certiorari denied, 321 U.S. 786 (1944); Smolowe v. Delendo Corp., 136 F. 2d 231 (C.A. 2), certiorari denied, 320 U.S. 751 (1943); Wright v. Securities and Exchange Commission, 112 F. 2d 89 (C.A. 2, 1940).

In the most recent of these cases, this Court considered an action brought by Mr. Sloan, which sought, inter alia, to have the Securities Exchange Act, and all of the rules promulgated thereunder, declared unconstitutional. Sloan v. Securities and Exchange Commission, et al., 535 F. 2d 676 (C.A. 2, 1976) petition for a writ of certiorari filed September 10, 1976. This Court there held, in affirming the district court's dismissal of the complaint, that Mr. Sloan's "massive though diffuse attack" on "the entire structure of securities regulation in the United States" was "frivolous." 535 F 2d at 678. In addition, noting that certain of the same constitutional claims had been raised by Mr. Sloan in an earlier appeal, 19/ the court's opinion declared (id.):

> "We then characterized his 'blunderbuss attack' as 'frivolous' . . . . We adhere to that view."

Moreover, this Court specifically held that the Securities Exchange Act and the Commission rules challenged by Mr. Sloan, including the two sections of the Act which then authorized the Commission to issue summary trading suspension orders, 20/ "are valid and reasonable exercises of congressional power under the commerce clause and the SEC's delegated regulatory power, which infringe no constitutional rights of plaintiff." 535 F. 2d at 678. The petitioner continues to urge, however (Br. 34), that "summary suspension of trading in a security without prior notice and the opportunity for a hearing is in all cases unconstitutional."

19/ Sloan v. Securities and Exchange Commission, 527 F. 2d 11, supra n. 4.

20/ Former Sections 15(c)(5) and 19(a)(4), supra. p. 3.

The Securities Exchange Act is a valid exercise of the power of Congress to regulate interstate and foreign commerce. As the Supreme Court stated in upholding the constitutionality of another statute administered by the Commission, the Public Utility Holding Company Act, 15 U.S.C. 79a, et seq.:

> "Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired conditions in the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 196."

American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 100 (1946). The Supreme Court there pointed out (id. at 105):

> "The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."

Section 12(k) of the Securities Exchange Act empowers the Commission summarily to suspend trading for limited periods when in its opinion "the public interest" and "the protection of investors" so requires. The Commission submits that this provision is a reasonable method of implementing the lawful purposes of the Securities Exchange Act, and, hence is constitutionally permissible.

The maintenance of fair and orderly trading markets is one of the major objectives of the Securities Exchange Act. The very title

of the statute describes it as "[a]n Act to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes." Since timing is of paramount importance in effecting a successful manipulation, in using advance information to the detriment of others, or in perpetrating a fraud upon the marketplace, regulation of the securities markets could not be expected to be "reasonably complete and effective," as intended by Congress (see Section 2 of the Act), unless the regulatory body were given authority to take immediate action.

One of the primary purposes of the trading-suspension provision is to prevent securities from being traded in the markets while the investing public is without sufficient information to make investment decisions with respect to a stock or when it appears that the securities are the subject of a scheme to manipulate the market in order artificially to inflate, maintain or depress the value of a stock. The legislative history of Section 15(c)(5), as we have seen, p. 10, supra, mandates that the suspension power be used "in those cases in which fraudulent or manipulative practices of the issuer or other persons have deprived the security of a fair and orderly market, or where some corporate event makes informed trading impossible and provides opportunities for the deception of investors." It was understood that "[t]rading would be resumed as soon as adequate disclosure and

dissemination of the facts material to informed investment decision were achieved." 21/

Surely the rapidity with which transactions occur on the national securities exchanges and in a computerized over-the-counter market and the absolute necessity of maintaining secure and stable national capital markets must sustain the Commission's statutory authority summarily to suspend trading. 22/ The nature of securities trading is such that immediate and substantial injury could result from even

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21/ S. Rep. No. 379, 88th Cong., 1st Sess., (1963), p. 66.

22/ The Court of Appeals for the District of Columbia Circuit, has recognized in R. A. Holman & Co. v. Securities and Exchange Commission, 299 F. 2d 127, 132 (1962), that the performance of Commission's statutory functions requires flexibility in the application of remedies, including the power to act summarily:

> "In all the statutes under which the Securities and Exchange Commission operates, Congress has given it broad rulemaking powers. See III Loss, Securities Regulation 1936 et seq. (1961) In view of the nature of the subject matter, the grant of such powers was imperative, to protect investors against fraud or deception made possible by constantly changing conditions."

Before the court in that action was a Commission rule which in effect summarily denied to an issuing company the availability of the small offering exemption from registration if any of the company's underwriters or officers was an underwriter of a securities issue subject to a pending suspension proceeding.

The court cited there (299 F. 2d at 131) a decision of the Supreme Court of Wisconsin upholding the constitutionality of the summary suspension of a stock broker's license under state law. Halsey, Stuart & Co. v. Public Service Commission, 212 Wis. 184, 248 N. W. 458 (1933).

a day's delay in suspension. The public interest would be disserved by the Commission's postponing its initial suspension action pending the outcome of even the most abbreviated hearing.

The standards prescribed by Section 12(k) are adequate to guide the Commission in the exercise of its administrative discretion. 23/ That provision requires that the action of the Commission be taken only in situations where such action is necessary or appropriate for the protection of investors and if the public interest so requires. Each of these two standards, "public interest" and "protection of investors," has been held adequate by the courts to satisfy constitutional requirements. In Wright v. Securities and Exchange Commission, 112 F. 2d 89, 94-95 (C.A. 2, 1940), this Court held that the "protection of investors," standard in Section 19 of the Securities Exchange Act was a sufficiently definite criterion to guide the Commission in the exercise of its administrative authority. 24/ Similarly, in American Sumatra Tobacco Corp.

23/ In Lichter v. United States, 334 U.S. 742, 785 (1948), the Supreme Court discussed the degree of specificity required of standards for a constitutional grant of discretionary agency power:

"It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."

24/ In Wright this Court heard a petition for review of a Commission order expelling a stock exchange member pursuant to Section 19(a)(3) of the Securities Exchange Act, 15 U.S.C. 78s(a)(3), and held that the Congress' delegation of power to the Commission in that statute was constitutionally permissible. The matter was remanded for further consideration by the Commission, in its discretion, of the remedy it had imposed.

v. Securities and Exchange Commission, 110 F. 2d 117, 121 (C.A. D.C., 1940), it was held that the "public interest" standard in Section 24(b) of the Securities Exchange Act was "a sufficient guide," in the light of the "main purpose of the Act . . . to insure the maintenance of fair and honest markets in transactions in securities on national exchanges," and, accordingly, that no unconstitutional delegation of authority was involved.

The Supreme Court has repeatedly held that summary administrative action affecting property interests will be sustained in extraordinary situations where some valid governmental interest is at stake. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (summary seizure of pleasure yacht); Board of Regents of State Colleges v. Roth 408 U.S. 564 (1972) (nonretention of state university teacher); Fuentes v. Shevin, 407 U.S. 67 (1972) (statute permitting summary replevin by private person); Fahey v. Mallonee, 332 U.S. 245 (1947) (appointment of savings and loan association conservator); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (multiple seizures of misbranded drugs); Bowles v. Willingham, 321 U.S. 503 (1944) (Emergency Price Control Act provision authorizing rent ceilings); Phillips v. Commissioner, 283 U.S. 589 (1931) (tax deficiency judgments without prior hearing on liability). Cf. Bell v. Burson, 402 U.S. 535 (1971) (summary suspension of vehicle registration and driver's license); Bi-Metallic Investment Co. v. State Board, 239 U.S. 441 (1915) (State ordered increase in property valuations). This Court

has also had occasion to apply this doctrine sustaining summary administrative action in the public interest. Pordum v. Board of Regents of State of New York, 491 F. 2d 1281, 1284-1285 (C.A. 2, 1974) (Commissioner of Education: summary suspension of teacher upheld).

In sustaining the Federal Home Loan Bank Board's appointment of a conservator for the assets of a savings and loan association prior to a hearing the Court balanced the exigencies of banking and need for swift administrative action against the strength of the remedy:

> "This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking, we cannot say it is unconstitutional."
> Fahey v. Mallonee, supra, 332 U.S. 253-254.

The fact that Congress has permitted the Commission to "roll over" these trading suspensions (see pp. 11-12, supra) adds nothing to the constitutional problem so long as the Commission carefully considers each trading suspension individually, as it does, and so long as the Commission permits persons aggrieved to complain to it and the courts permit review for abuse of the Commission's discretion.

IV. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN ORDERING THE SUSPENSIONS OF TRADING IN THE SECURITIES OF CJL SOUGHT TO BE REVIEWED.

As we have seen, pages 2-4 supra., the trading suspensions under review were issued as part of a series of suspensions which commenced on April 29, 1975, after the Commission had been informed

that Canadian authorities were "conducting an extensive investigation" into what they believed to be "a manipulation of Canadian Javelin's common stock on several Canadian stock exchanges as well as on the American Stock Exchange." Although the trading suspension was initially sought "pending an announcement by Canadian Javelin concerning the investigation by Canadian authorities," (A.12), as we have noted, there was no such announcement. The Commission, however, had commenced its own investigation on April 29, 1975, of the allegations that trading in CJL stock was being manipulated, and, although the Commission's staff encountered certain difficulties in conducting the investigation, facts were uncovered which eventually led to the filing of a civil injunctive action on April 26, 1976, alleging that Mr. Doyle and certain other insiders of CJL had engaged in a scheme to manipulate the trading of CJL stock. In filing the complaint and issuing a litigation release announcing that an enforcement action had been commenced, the Commission was able to make public certain material information concerning the alleged manipulative activity. 25/ This information, insofar as it concerned the manipulation of trading in CJL stock in the United states by CJL insiders, had not previously been in the public domain. If the Commission had permitted the trading suspensions to terminate without disclosure of the information that CJL insiders were manipulating the trading in CJL stock, those insiders would have been free to take advantage of unsuspecting public investors. Accordingly,

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25/ Litigation Release No. 7371; 9 SEC Docket (April 26, 1976).

in view of the clearly articulated purpose of Congress that the Commission should have discretion summarily to suspend trading "in the public interest" and "for the protection of investors," the Commission acted properly in issuing the trading suspension orders under review in this case.

CONCLUSION

For the foregoing reasons, this petition for review should be denied, or alternatively, the Commission's orders should be affirmed.

Respectfully submitted,

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